United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-5015

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 77-5015

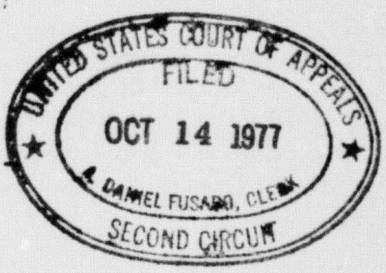
In the Matter

of

DYNAMICS CORPORATION OF AMERICA,

Debtor.

(No. 72 B 750)



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HOOS & CO.,

Claimant-Appellant,

vs.

DYNAMICS CORPORATION OF AMERICA,

Debtor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(No. 72 B 750)

REPLY BRIEF OF CLAIMANT-APPELLANT HOOS & CO.

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October 14, 1977

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In the Matter	:	
of	:	
DYNAMICS CORPORATION OF AMERICA,	:	
Debtor,	:	
HOOS & CO.,	:	Docket No. 77-5015
Claimant-Appellant,	:	
-against-	:	
DYNAMICS CORPORATION OF AMERICA,	:	
Debtor-Appellee.	:	

REPLY BRIEF OF CLAIMANT-APPELLANT HOOS & CO.

Debtor's answering brief avoids the threshold issue on this appeal -- the illogic and unfairness of treating as separate and unequal the two parts of a unified claim to $500,000 of the debtor's registered notes.

Moreover, debtor attempts to uphold the essential legal conclusion of the Courts below -- that delivery of a claim to the Secretary of the Creditors' Committee cannot be a valid filing under the Bankruptcy Act -- by ignoring Judge Trevethan's decision in Matter of T.M. Systems, Inc.,

(D. Conn. 1974),* which held directly to the contrary and thus lends decisive support to the position of claimants on this appeal.

A. Debtor Offers no Justification for the Unjust Discrimination between the Two Parts of a Unified Claim

Claimant's threshold contention on this appeal is that its claims to $500,000 of the debtor's notes constitute a unified claim, which should be allowed in full rather than only in part. (See claimant's initial brief, part I, p. 14-17) Debtor's answering brief largely ignores this basic question, and makes no attempt to justify the artificial and unfair discrimination between the two parts of this single claim.

Thus, debtor asserts, in direct contradiction of the record,** that the "sole basis" for the claim of Hoos & Co. is the "Lipp letter". (Br. at 14) However, this characterization of the basis of the Hoos claim is directly contradicted by the debtor's own concession that "as the basis of its claim herein, Hoos relies solely on the September 8, 1972 letter from Lipp, and the accompanying proof of claim for

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* A copy of this unreported decision is attached as Exhibit A.

** See Transcript of Proceedings, November 5, 1975 (a-6-7), Statement of Issues and Description of Record on Appeal to District Court, par. 1, (a-116).

$300,000 for separate notes not in issue in this case, which latter claim has been paid in this proceeding pursuant to the DCA plan of arrangement." (Br. at 10).

In spite of this concession, debtor labels as "absurd" the argument "that there is a unified claim." (Br. at 14), and asserts that "it is clear . . . that the [claimant's] letter cannot be considered part of a unified claim" (Br. at 20). Debtor says nothing to explain or even identify any basis for this "clear" conclusion.

In contrast to these ipse dixits, claimant has demonstrated without contradiction that the letter and claim form were transmitted together, in the same envelope, to the Secretary of the Creditors Committee, in response to his specific request and representation that the claims would be filed with the Court (a-13), that the maturity and rate of interest of the total of $500,000 in notes was described only in the September 8 letter (a-2-3), that the letter requested the Creditors Committee to include "this claim with ours" (a-2), and that the debtor itself treated the full $500,000 as a unified claim in the schedule of indebtedness filed in this proceeding on October 5, 1972, within one month of Mr. Lipp's submission of the letter and accompanying claim form (a-39). (See claimant's initial brief at 15-16.)

In sum, the undisputed record evidence establishes the unified nature of the claims on this appeal and claimant's just entitlement to their allowance in full. Both the Bankruptcy Court and the District Court avoided the issue of the unified nature of these claims (see claimant's initial brief, p. 15-17), and debtor's answering brief attempts no justification of the discriminatory and unjust result sanctioned by the erroneous rulings of the Courts below. Because of their essential unity, the claims of appellant Hoos & Co. should be allowed in full.

B. The Decision in T.M. Systems, Inc. Directly Supports the Validity of the Filing of the Claim in Question, and Contradicts the Essential Legal Conclusion of the Courts Below

In Matter of T.M. Systems, Inc., supra. (D. Conn., No. B-74-168, November 27, 1974 - not officially reported)*, Judge Trevethan held that delivery of a statement of claim to a member of the Creditors Committee constituted a valid, timely filing under Section 355 of the Bankruptcy Act and Bankruptcy Rule 509(c). This holding -- in a comprehensive and carefully reasoned opinion -- directly contradicts the essential legal conclusion of the Courts below -- that delivery of a statement of claim to the Secretary of the Creditors

* A copy of this unreported opinion is attached as Exhibit A.

Committee is ineffective to constitute a valid filing under the Bankruptcy Act and Rules. (a-124)

Counsel for appellant first became aware of the decision in T.M. Systems, Inc. after the filing of our initial brief, and thereafter promptly advised counsel for debtor of appellant's intended reliance on that decision in this appeal. While debtor had ample opportunity to consider this directly pertinent decision in its answering brief, it said nothing. This conspicuous silence raises the pointed inference that debtor had no answer to the decisive impact of this decision.

In T.M. Systems, Inc., supra, a creditor delivered its acceptance and proof of claim (for $38,900) to a member of the Creditors Committee (who apparently served as its attorney) on June 13, 1974, one day before the Court entered an order confirming the debtor's plan of arrangement. The additional period of 30 days for the filing of claims provided by Section 355(1) of the Bankruptcy Act, 11 U.S.C. § 755(a), as fixed by notice to creditors, expired on July 28, 1974. Claims and acceptances of two other creditors (in the total amount of $1,007.63) were received by the attorney for the Creditors Committee before the July 28, 1974 deadline. As found by Judge Trevethan: "The [disputed] claims were delivered by the creditors to [the Committee's

attorney] within the times provided by Section 355 of the Act. However, they were not filed with this Court until August 1, 1974 which was after expiration of the final limit of time for filing claims provided by Section 355 of the Act." (Slip Op. (Ex. A), p.2).

In determining that the receipt of the disputed claims by the Creditors Committee attorney "constituted a sufficient filing of them under section 355 to warrant their allowance as duly filed claims" (Slip Op. at 2), the Court concluded that "the question is whether these provisions of the Rules [Rules 509(a) and (c), made applicable in Chapter XI proceedings by Rules 11-33(b)(1) and 302(b)] are fixed and immutable or whether there is enough play in the joints, in the light of other provisions of Chapter XI and the circumstances here existing, so that the timely delivery of the proofs of claim to the creditors' committee constitutes an acceptable filing of the claims." (Slip Op. at 3).

The essential legal conclusion on which denial of the claim herein was based is that the Secretary of the Creditors Committee "does not come within the language of [Rule 509(c)] as one of the named individuals to whom delivery of a proof of claim may be deemed a valid filing." (a-124). Contrary to this ruling, Judge Trevethan found

that "there is enough play in the joints" of these provisions so that a timely delivery of proofs of claim to the Creditors Committee can constitute an acceptable filing of the claim.

In reaching this conclusion, Judge Trevethan recognized that one of the express functions of the Creditors' Committee, under Section 339(1)(e) of the Bankruptcy Act, is "to collect and file with the Court acceptances of the arrangement proposed." (Slip Op. at 5). Finding that the acceptances constituted a sufficient informal assertion of claim to permit their amendment after expiration of the time for filing claims, the Court concluded that since the Creditors Committee was "authorized to receive" the acceptances, and the creditors "acted properly in conformance with the authority conferred by statute in delivering their acceptances to the committee", the filing of such acceptances (found to be sufficient as informal proofs of claim) constituted a valid filing under Section 355 of the Bankruptcy Act. (Slip Op. at 5).

In concluding that a valid filing under Rule 509(c) could not be made with the Secretary of the Creditors Committee, the Courts below reasoned that the Secretary "is the agent of the creditors, not the agent of the Court, nor the agent of the debtor." (a-112-12; a-124). Thus, as viewed by the Courts below, the Secretary of the Creditors Committee

was not specifically mentioned in Rule 509(c), and his actions could not be considered to be as an agent of parties enumerated in that rule, i.e., the court or the debtor itself.

Yet in T.M. Systems, Judge Trevethan specifically rejects the premise of the analysis adopted by the Courts below, finding that to the extent the Creditors Committee performed a function which it was authorized to perform in a Chapter 11 proceeding, the delivery of a written statement of claim to the Committee, acting within the scope of its authorized functions, constitutes a valid filing under Rule 509(c), in order to satisfy the timeliness requirement of Section 355 of the Bankruptcy Act. (Slip Op. at 5-6).

The reasoning and conclusion of Judge Trevethan in T.M. Systems is fully applicable in the present case. Here, the Secretary of the Creditors Committee represented that he was authorized (and in fact was authorized) to solicit proofs of claim for filing with the Court, and claims so submitted were filed with the Court. This solicitation and filing of claims was performed for the benefit of the creditors as well as the Court* and thus was clearly appropriate and authorized under Bankruptcy Rule 11-29, which

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* Tulchin affidavit, December 9, 1974, par. 8; Lipp affidavit, June 11, 1975, par. 7 (a-9).

provides that the Creditors Committee, in addition to certain enumerated functions, may "perform such other services as may be in the interest of creditors."

In summary, T.M. Systems, Inc. confirms the validity of the filing of the claim in question with the Secretary of the Creditors Committee. Debtor's complete silence concerning this opinion, and its attempt to argue this issue as if the opinion did not exist, only underscore the decisive effect of that opinion on the present appeal.*

C. Debtor's Principal Contentions -- with respect to Section 355 and Rule 11-33 and the Formal Sufficiency of the Claim -- Are Clearly Erroneous

As considered in parts A and B above, debtor's answering brief fails to address the salient issues on this appeal -- the unified nature of the claim in question and

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* Although debtor was made aware of the decision in T.M. Systems, Inc. by counsel for appellant more than two weeks before the filing of its answering brief, the debtor's answering brief surprisingly asserts that "Bankruptcy Rule 509(c) as applied to Chapter XI ... would not, under any circumstances, permit a mistaken delivery of a proof of claim to a Creditors' Committee Secretary to be allowed." (Br. at 15-16, emphasis added). Further, debtor asserts that "in none of the cases cited by Hoos was an actual proof of claim given to a Creditors Committee, Secretary to an Unofficial Creditors' Committee, or its agent" (Br. at 15) although debtor was aware of the decision and of appellant's intended reliance thereon.

the direct impact of T.M. Systems, Inc. on the underlying legal conclusion of the Courts below. Instead, debtor's brief is substantially devoted to the consideration of non-issues and inapposite authorities.

1. Bankruptcy Rule 11-33

Debtor's contentions with respect to the impact of Bankruptcy Rule 11-33 are premised on an erroneous characterization of claimant's legal position.

Bankruptcy Rule 11-33(b)(2) (implementing Section 355 of the Bankruptcy Act) provides that a claim, including an amendment thereof, must be filed before confirmation. In this proceeding, claimant has not sought to file a claim, or an amendment of claim after the date of confirmation (November 27, 1974). Rather, as recognized by the debtor, "as the basis of its claim herein, Hoos relies solely on the September 8, 1972 letter from [Theodore] Lipp, and the accompanying proof of claim for $300,000 . . ." (Br. at 10; See Findings of Fact, par. 20, a-111-12). Debtor's contention (p. 13) that under Rule 11-13(b)(2) "there is no discretion by the Court to allow a late amendment to a claim" is irrelevant, since Hoos does not seek to amend its claim, but to obtain full allowance of a claim which was filed in September, 1972 -- and which has already been paid in part. (Findings of Fact, par. 7, a-108)

2. Section 355 of the Bankruptcy Act

Debtor's contentions with respect to Section 355 of the Bankruptcy Act, 11 U.S.C. § 755(a), ignore the directly applicable decision in T.M. Systems, Inc., supra, and rest on an incomplete consideration of the pertinent legislative history of that provision.

Debtor asserts that the equitable authority of the Bankruptcy Court to allow the claim at issue has been restricted by the 1967 amendment of Section 355 of the Bankruptcy Act -- from which Rule 11-33 is derived. According to debtor, "the cases on which Hoos relies are no longer applicable since the enactment of Section 355, Rule 11-33, 11-63 and 906b." (Br. at 15). However, the pertinent legislative history of Section 355 directly contradicts this assertion. (See claimant's initial brief, p. 27-29). Moreover, this assertion by debtor with respect to the limiting effect of Section 355 completely ignores T.M. Systems, Inc., supra, which was decided after the amendment of Section 355 and the enactment of Rule 11-33.

As demonstrated by T.M. Systems, Inc., the 1963 amendments of Section 355 (and the Rules implementing that provision) were not intended to restrict the long recognized equitable authority of the Court to determine the proper form and manner of the filing of particular claims. As Judge

Trevethan found, these provisions are not "fixed and immutable" and there is "enough play in the joints" for a Court to do equity in light of the particular circumstances of the case.

The filing requirement imposed for the first time in Chapter 11 proceedings by amended Section 355 was intended to avoid the effect of intentional or inadvertent inaccuracies in the debtor's schedules.* Debtor's reply brief (like the analysis of the Courts below) attempts no justification for the application of Section 355 to bar the claim at issue where the underlying debt was at all times registered on the debtor's books, and its amount and validity undisputed. Cf. T.M. Systems, Inc., supra.

Debtor's answering brief in fact concedes that the 1967 amendment of Section 355 was intended to avoid "a windfall" or "undeserved benefit to the debtor" (Br. at 18). The debtor has already avoided 71-1/2% of a conceded $200,000 obligation under its plan of arrangement. To avoid, under the present circumstances, even the 28-1/2% dividend required by its plan would constitute an improper "windfall" and "undeserved benefit" to the debtor in direct conflict with the fundamental policies of Section 355.

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* See claimant's initial brief, p. 27-28.

3. Under the Decision of the Court Below and Consistent Authority in this Circuit, the September 8, 1972 Letter is Sufficient in Form to Constitute a Valid Claim

Debtor's contention that the Lipp letter (a-2) is insufficient in form to constitute a valid statement of claim was rejected by the District Court below, and is in conflict with T.M. Systems, Inc., and consistent prior authority in this Circuit.

In contending that "the writing submitted by Hoos [the Lipp letter of September 8, 1972 (a-2)] does not meet the substantive requirements of a proof of claim" (Br. at 19), debtor remarkably ignores the ruling of the District Court, which rejected the Bankruptcy Court's conclusion that the Lipp letter was insufficient in form. The District Court expressly recognized "the more liberal approach which has been taken in this Circuit concerning what is necessary in order for a written instrument to be considered an informal proof of claim." (a-123).

Bankruptcy Rule 301(a) -- made applicable to Chapter 11 cases by Rule 11-33(a) -- provides that a proof of claim "shall consist of a statement in writing, setting forth a creditor's claim . . . shall be executed by the creditor or by his authorized agent", and "shall conform substantially to Official Form No. 15". Mr. Lipp's September 8, 1972 letter (a-2) was precisely such a written

statement of the creditor's claim, specifying its basis and extent. Further, Mr. Lipp, as a partner of Hoos & Co., had full authority to file a claim to the Carrier notes registered in Hoos & Co. The conclusion of the District Court (a-123) that the Lipp letter was sufficient in form to constitute a proof of claim is clearly correct under the above Rules, and fully supported by the prior decisions of this Court:* (See also T.M. Systems, Inc., supra: "the acceptances of the three creditors now in issue were in writing, set forth the amount of their respective claims and clearly constituted a sufficient informal assetion of claim to permit of their amendment after expiration of the time for filing claims." (Slip Op. at 5).

The authorities cited by debtor (Br. at 14) are inapposite in several respects. In re Mellen Manufacturing Co. 287 F.2d 37, cert. denied, 366 U.S. 962 (1961) and In re Supernit Inc., 186 F.2d 130 (1950), are both decisions of the Third Circuit where, as recognized in Mellen, the rule as to timeliness of filing claims "has been stricter

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* In Re Lipman, 65 F.2d 366, 368 (2d Cir. 1933); Conway v. Union Bank of Switzerland, 204 F.2d 603, 606 (2d Cir. 1953): "Ever since Hutchinson v. Otis, Wilcox & Co., 190 U.S. 552 (1903), it has been a common-place in bankruptcy that a claim may be amended to conform to the required formalities, provided the 'cause of action' is the same, and this Circuit has been especially liberal in applying the doctrine." See Appellant's Brief, p. 18 p. 18, n.2.

than that in other circuits". 287 F.2d at 38.* These Third Circuit decisions are also distinguishable on their facts, since neither involved the filing or attempted filing of a written claim.**

In conclusion, debtor's continued reliance on the alleged formal irregularity of the written claim at issue is evidently an attempt to avoid any payment of an undisputed debt, on the basis of highly technical, formalistic grounds. Such an attempt to exalt form over substance (in disregard of fundamental equity) is thrown into sharp relief by this Court's recent decision in Matter of Banque de Financement (Finabank), (Docket No. 76-5026, August 30, 1977).

In Finabank, a foreign banking corporation filed a Chapter 11 petition in the Southern District, but because of constraints of the law of its domicile (Switzerland),

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* The narrower standard of Supernit, in contrast to the "liberal approach" in this Circuit, was recognized by Judge Medina in In re Gibralter Amusements Ltd., 315 F.2d 210, 214 (2d Cir. 1963).

** In Mellen the creditor who prepared a written claim but did not attempt to file it, asserted that "his claims were known to all parties" and that "he was present and participated in the initial meeting of creditors at which a trustee was elected", 287 F.2d at 38. In Supernit, the creditor appeared in the debtor's schedules, and at the first meeting of creditors, his counsel in oral argument "referred to the creditor's claim in the amount of $12,000 or $14,000", 186 F.2d at 131.

was unable to file the required list of creditors. Bankruptcy Act § 324(1), 11 U.S.C., 724(1) (1970) and Rule 11-11. Noting that "we know of no instance where a bankrupt has been excused from this filing requirement" (Slip Op. at 5627), the Court nevertheless reversed the lower court's dismissal of the Chapter 11 petition, and directed an inquiry to determine whether the list of creditors in possession of the Swiss Court could satisfy the applicable requirement of Chapter 11. (Slip Op. at 5631, 5636).

In Finabank, this Court recognized that further inquiry as to relief under Chapter 11 was necessary in order to foster "one of the basic purposes of the [Bankruptcy] Act, i.e. equal distribution among creditors." (Slip Op. at 5629).

In contrast to this Court's flexible application of Chapter 11 filing requirements in Finabank, in order to foster equal distribution among creditors, the decision of the Courts below allowed this fundamental policy to be negated by a constricted view of the purposes of the Bankruptcy Act and of the Court's equitable authority in implementing them. Such a result is flatly inconsistent with substantial prior authority in this Circuit, and with the more recent decisions in T.M. Systems, Inc. and Finabank.

CONCLUSION

For the foregoing reasons, and the reasons considered in claimant's principal brief, dated August 16, 1977, the order of the District Court, dated May 17, 1977, should be reversed and the claim of Hoos & Co. with respect to $200,000 of debtor's notes should be allowed.

Respectfully submitted,

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October 14, 1977.

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re

T M Systems, Inc., Debtor

Bankruptcy No. B-74-168

D. 6

ORDER ON DISPUTED CLAIMS

The debtor filed an application to expunge various claims which included the following:

Kaufman Instrument Lab, Inc.	$ 440.18
Utronics, Inc.	38,900.00
Torotel, Inc.	567.45

It is the allowance of these three claims which is now to be determined.

The facts are that at the first meeting of creditors in this Chapter XI case held on May 28, 1974 Stuart I. Levin (Levin) and Samuel Rost were elected by creditors to constitute the creditors' committee and this committee was approved by this court in the order of May 29, 1974. It is asserted by Levin, and seems to be accepted by the debtor, that Levin also served as counsel for the creditors' committee, but there is nothing evidential before the court to show this.

After the debtor had proposed a plan of arrangement acceptable to this committee, then the committee circularized creditors for their proofs of claim and acceptances of the arrangement. The debtor or its attorney would visit Levin's office and obtain the proofs of claims and acceptance received by him which were then filed with this court.

Utronics' proof of claim and acceptance were received by Levin on June 13, 1974 which was the day before order of this court entered confirming the debtor's arrangement. Kaufmen's and Torotel's proof and acceptances were received by Levin before July 28, 1974. The thirty days' additional period for filing claims provided by section 355 (1) of the Bankruptcy Act, as fixed by notice issued to creditors by this court, expired on July 28, 1974. Thus the claims were delivered by the creditors to Levin within the times provided by section 355 of the Act. However, they were not filed with this court until August 1, 1974 which was after expiration of the final limit of time for filing claims provided by section 355 of the Act.

The issue is whether or not Levin's receipt of these claims constituted a sufficient filing of them under section 355 to warrant their allowance as duly filed claims. The portions of that section which are material provide that creditors shall file their claims before confirmation with a permissible filing during a subsequent thirty day period to be fixed by the court. Only those creditors who file within these time limits are entitled to the benefits and rights which inure to creditors under the arrangement. Bankruptcy Act, sec. 367.

Both in straight bankruptcy and Chapter XI cases proofs of claim are to be filed with the referee, but if any are erroneously delivered to the trustee or receiver or the attorney for either of them or to the district judge or the clerk of the district court, then they shall be transmitted to the referee and, in the interests of justice, the court

(referee) may order that such claims shall be deemed filed as of the date of their orignal delivery, Chap. XI Rule 11-33 (b) (1); Bankruptcy Rules 302 (b) and 509 (a) and (c). The question then is whether these provisions of the Rules are fixed and immutable or whether there is enough play in the joints, in the light of other provisions of Chapter XI and the circumstances here existing, so that the timely delivery of the proofs of claim to the creditors' committee constitutes an acceptable filing of the claims.

The functions of a Chapter XI creditors' committee may include the collection and filing with the court of acceptances of a proposed arrangement and the performance of such other services as may contribute to the confirmation of the arrangement. Bankruptcy Act, sec. 339. It is apparent that here the committee's solicitation of not only the acceptances of creditors but also their proofs of claim was with the debtor's tacit, if not express, consent and approval and was a vital contribution to confirmation of the arrangement since only those creditors whose proofs of claim are filed before conclusion of the first meeting of creditors are counted in determining if an arrangement has been accepted by the requisite majority. See Bankruptcy Act, sec. 362. Thus, the solicitation and receipt of proofs of claim and acceptances by the committee was a function it was authorized to perform both for the benefit of the debtor and as an official entity in this case.

Section 342 of the Act provides that in Chapter XI cases where "no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have

all the title and exercise all the powers of a trustee appointed under this Act . . .". Here, there was no receiver or trustee and the debtor was left in possession to conduct its business pursuant to order of this court. As we have already said, under the Rules a receiver or trustee, or their attorneys, in a Chapter XI case may receive a proof of claim which can be validated by the court as a filing as of the date it was delivered to the receiver, trustee or their attorneys. A debtor in possession has all the powers of a trustee. This means that the debtor in possession stands in the stead of a trustee as the fiduciary in the case. It then must follow that the receipt of a proof of claim filed with the debtor in possession is subject to the same validation as if it had been filed with a trustee had there been one. Cf United States v. Speers, 382 U.S. 266, 86 S. Ct. 411 (1965). Thus, in the view of this court, had the instant proofs of claim been delivered to the debtor in possession or its attorney, this court could order that they be deemed filed with it as of the date of their receipt by the debtor in possession or its attorney.

Delivery of the proofs of claim and acceptances to the creditors' committee was with the consent and approval of the debtor and was a function the creditors' committee was officially authorized to perform. And, of course, the debtor was the one primarily benefited by the receipt of claims and acceptances since they were requisite to bring its plan of arrangement to confirmation. Thus, in collecting the proofs of claim the committee was performing a beneficial service for the debtor with the debtor's approval and

consent. This leads to the conclusion that there existed the relationship of principal and agent in fact between the debtor and the creditors' committee with respect to the collection of claims. The act of the agent was the act of the principal. The agent's receipt of the proofs of claim was the principal's constructive receipt of them. It follows, then, that as a matter of law there was delivery of the proofs of claim to the debtor and this court may now order that they be deemed filed with it as of the date of delivery.

There is another avenue of reasoning which leads to this same result. As has been said, one of the express functions of the creditors' committee under the Bankruptcy Act is "to collect and file with the court acceptances of the arrangement proposed". Bankruptcy Act sec. 339 (1) (e). Here, the acceptances of the three creditors now in issue were in writing, set forth the amount of their respective claims and clearly constituted a suffident informal assertion of claim to permit of their amendment after expiration of the time for filing claims. In re Lipman, CA-2d, 1933, 65 F2d 366, 23 Am. B. R. (N.S.) 342; Matter of Weco Equipment, Inc., E.D.N.Y., 1944, 55 F. Supp. 532, 56 Am. B.R. (N.S.) 452, aff'd per curiam sub nom. Public Operating Corp. v. Schneider, CA-2d, 1944, 145 F2d 830; 3 Collier, Bankruptcy, par. 57.11 (3).

These acceptances the committee was authorized to receive and the creditors acted properly in conformance with the authority conferred by statute in delivering their acceptances to the committee. The duty then fell upon the

committee to file them in court. It failed promptly to perform it. Thus, the creditors acted properly in delivering writings which, if the officially approved creditors' committee had promptly performed its duty, would have been timely filed and would have constituted a sufficient assertion of claims to escape the temporal bar of section 355 of the Act.

It would be gross unfairness and inequity if the three creditors were to be denied participation under the arrangement through no fault of their own but because a committee officially approved by this court had failed to perform the duty imposed by statute upon it. All obvious considerations of justice and equity compel that the delivery of the acceptances to the committee be deemed to constitute a sufficient act by the creditors to accomplish filing of their acceptances with the court as of the date of their receipt by the committee. And so viewing it, their informal assertion of claims was a timely filing to allow of later amendment by the filing of the actual proofs of claim.

And the reasoning here expressed finds support when it is considered that in addition to the power and authority possessed by a debtor in possession and a creditors' committee under Chapter XI, which do not exist in a straight bankruptcy, there is a material difference between the monetary position of creditors in straight bankruptcy and in a Chapter XI case. In the former the allowance of additional claims will operate to reduce the proportionate share of creditors participating in the funds of the bankruptcy estate. But in a Chapter XI case creditors

receive the fixed percentage provided for them by the plan of arrangement; the addition of other creditors does not affect their rights under the plan but only makes the debtor face up to obligations which it might have escaped through elimination of them by non-filing or judicial disallowance. This lack of prejudice to creditors is a strong factor which leaves more play in the joints of the law to allow justice, equity and fair dealing to have their impact. See In re Lipman, supra.

It is, accordingly,

ORDERED that the claims of Kaufman Instrument Lab Inc., Utronics, Inc. and Torotel, Inc. are deemed filed as of their date of delivery to the creditors' committee and are allowed as timely filed claims.

Dated at Bridgeport, November 27, 1974.

R. E. Trevethan
Bankruptcy Judge